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In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion and order of the district court denying the government's petition for modification (App. A, *infra,* pp. 25–39) is reported at 266 F. Supp. 328. The original opinion and decree of the district court is reported at 110 F. Supp. 295, and the *per curiam* opinion of this Court affirming that decree is reported at 347 U.S. 521.

JURISDICTION

The order of the district court was entered on April 11, 1967. The United States filed a notice of appeal on June 9, 1967. By order dated August 7, 1967, the lower court extended the time for docketing the ap-

peal to September 8, 1967. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States,* 370 U.S. 294; *United States* v. *E. I. duPont de Nemours & Co.,* 366 U.S. 316.

QUESTION PRESENTED

In a government civil action brought under the Sherman Act, the district court in 1953 entered a decree, which this Court affirmed, to remedy United Shoe Machinery Corporation's 85-percent monopoly of the shoe machinery industry. A paragraph of that decree expressly directed the parties to report in ten years on the effect of the decree, and authorized them to petition for its modification in view of its effect in establishing workable competition in the industry. Under this provision the government showed that, as of 1964, the shoe machinery industry still had a monopolistic structure in which United's market share is more than 60 percent, and petitioned for further relief to dissipate United's monopoly. The district court, relying on *United States* v. *Swift & Co.,* 286 U.S. 106, denied the petition on the grounds that the decree was working as originally contemplated and that the government had not clearly shown grievous wrong evoked by new and unforeseen circumstances. The question presented is whether the district court's decision was based upon an erroneous standard for determining when the government is entitled to further relief in Sherman Act cases, particularly since

the original decree specifically contemplated future judicial consideration of its effectiveness.

STATUTE INVOLVED

Sections 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2, 4, provide in pertinent part:

> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> * * * * *
>
> Section 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title * * *.

STATEMENT

This is a direct appeal from an order of the district court denying the government's petition to modify the decree entered in 1953 against the United Shoe Machinery Corp. ("United"). That decree was grounded upon a determination that United had violated Section 2 of the Sherman Act by monopolizing the manufacture of shoe machinery and certain lines of shoe factory supplies. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, affirmed, 347 U.S. 521. The decree (110 F. Supp. at 351–354; set out, as modified, in App. B, *infra.*, pp. 41–49) provided specific remedies relating to United's leasing of shoe machines, including a requirement that it offer for sale

any machine it leases, required United to license the patents it then held on a reasonable royalty basis, limited United's power to make future acquisitions, and granted certain other relief.

Paragraph 18 of the decree provided that, ten years after its entry,

> * * * both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market. [110 F. Supp. at 354; App. B, p. 48.]

On January 1, 1965, the United States reported that workable competition had not been established in the shoe machinery industry and petitioned for additional relief. United cross-petitioned to be relieved from certain restrictions of the decree. On April 11, 1967, the district court denied both petitions (App. A, p. 39).[1]

I. THE UNDERLYING FACTS

A. UNITED SHOE MACHINERY CORP.

United is the largest manufacturer of shoe machinery in the world, and has been the dominant factor in the United States shoe machinery market since 1899, when its corporate predecessor was created as an agglomeration of most of the significant American manufacturers of shoe machinery (110 F. Supp. at

[1] United has not appealed from the denial of its cross-petition.

299–300). Its market dominance was preserved by a series of acquisitions and mergers (110 F. Supp. at 312).[2] In 1950 it was primarily a manufacturer of shoe machinery and shoe supplies, with assets of about $105 million; its 1946–1950 earnings after taxes ranged between $6.2 million and $8.8 million (110 F. Supp. at 300). By 1964 it had become a diversified company operating domestically and internationally through some 66 subsidiaries and affiliates which serve general industrial and consumer markets, as well as the footwear industry, in the United States and overseas. 1965 Moody's *Industrial Manual* 1200–1203. As of 1964, its assets totalled $232.5 million (*id.* at 1202), and its gross operating income from all sources was $208.7 million (*id.* at 1201). Sixty-two percent of its domestic revenues came from the footwear industry, from which it received income of some $59.2 million.[3] In addition to shoe machinery it also produces chemi-

[2] See also *United States* v. *United Shoe Machinery Co. of New Jersey*, 247 U.S. 32; *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

[3] The following table shows the principal sources of the company's total revenues in each of its past five fiscal years from the footwear industry and from general industries in terms of millions of dollars, and is derived from a preliminary prospectus, dated May 23, 1967, for $25,000,000 United Shoe Machinery Corp. sinking fund debentures (p. 5).

	1967	1966	1965	1964	1963
Domestic					
Footwear	$61.5 46%	$62.6 54%	$61.0 59%	$59.2 62%	$60.8 67%
General	73.1 54%	53.8 46%	42.5 41%	36.7 38%	30.6 33%
Total	$134.6	$116.4	$103.5	$95.9	$91.4
International					
Footwear	$77.7 52%	$73.5 55%	$72.3 58%	$67.5 60%	$65.6 62%
General	71.2 48%	60.8 45%	53.3 42%	45.2 40%	41.0 38%
Total	$148.9	$134.3	$125.6	$112.7	$106.6
Domestic and International					
Footwear	$139.2 49%	$136.1 54%	$133.3 58%	$126.7 61%	$126.4 64%
General	144.3 51%	114.6 46%	95.8 42%	81.9 39%	71.6 36%
Total	$283.5	$250.7	$229.1	$208.6	$198.0

cals, industrial adhesives, sealants and coatings, fasteners, shoe boxes, box-making machines, brushes, and customer-specified metal and plastic products.

B. THE STRUCTURE OF THE SHOE MACHINERY INDUSTRY AFTER THE DECREE

The relevant product market, as defined in the original opinion (110 F. Supp. at 302–303), included all shoe machines except dry-thread sewing and other machines not then offered by United. In this proceeding it was expanded to include vulcanizing machines, which the court found to compete with newly developed injection-molding machines as a method of attaching soles. (App. A, finding 3, p. 30.) The relevant geographic market is the entire United States.

In 1953 United's share of the shoe machinery market by any measure was about 85 percent (App. A, finding 2, pp. 29–30). The decree began operating in 1955 (App. B, p. 41). The government's evidence showed that, as of 1963, there were approximately 100 firms in the shoe machinery industry including 66 manufacturers (Pl. Exh. 69, App. A to P.P.T., Tr. 539),* 12 importers (Pl. Exh. 71, App. D to P.P.T., Tr. 546), and 22 second-hand dealers (Pl. Exh. 72, App. G to P.P.T., Tr. 551). Total industry revenues derived from the lease and sale of shoe machinery were $41.5 million (Pl. Exh. 73, App. E to P.P.T., Tr. 552). United's share was $25.8 million, consisting of $3.4 mil-

* "P.P.T." refers to Plaintiff's Post-Trial Brief. A number of the government's exhibits were reprinted as appendices to that brief, a copy of which is on file with the Clerk of this Court. The "Tr." reference is to where the exhibit was admitted into evidence. See note 5, *infra*.

lion in sales and $22.3 million in lease revenues, or 62.2 percent (Pl. Exh. 69, *supra*). United's largest competitor, International Shoe Machine Corp., had total revenues of $3.9 million; the next largest, Compo Shoe Machinery Corp., had revenues of about $3 million (Pl. Exh. 69, *supra*). No other manufacturers had sales in excess of $1 million, and only 16 had revenues in excess of $100,000 (Pl. Exh. 69, *supra*). The remaining 49 manufacturers were quite small. Of the 12 importers, whose combined revenues were only slightly over $1 million, only four had revenues in excess of $100,000 (Pl. Exh. 71, *supra*). The 22 second-hand dealers' total revenues were $3.4 million, but only one, Plymouth Machinery Company, had revenues in excess of $1 million, and only five others in excess of $100,000 (Pl. Exh. 72, *supra*). And there was evidence that because of the shoemakers' preference for leasing (App. A, finding 6, p. 32), the supply of used machines to the second-hand market is dwindling (Pl. Exh. 68, 74, Tr. 538, Tr. 557; see also Tr. 258).[5]

In its original opinion, the district court determined United's market position from a survey of percent-

[5] "Tr." refers to the transcript of proceedings in the district court, begun on October 17, 1966. "Pl. Exh." refers to exhibits introduced by the government in the proceedings below. Some of them were reprinted as part of the government's Post-Trial Brief (see note 4, *supra*), which is included as part of the certified record which is on file with the Clerk of this Court, as is the transcript of proceedings. Those exhibits not reprinted in the Post-Trial Brief were inadvertently omitted from the record originally certified, and are now being forwarded to the Clerk of this Court for inclusion in the certified record.

age shares of outstanding machines (110 F. Supp. at 303–307). In 1963, United accounted for approximately 84 percent of the 18 major machines listed in the original decree (Pl. Exh. 50, Tr. 350).[6] It shipped 65 percent of all major machines to shoe factories (Pl. Exh. 64, Tr. 388), and seven times as many machines of all types as its next largest competitor (Pl. Exh. 63, Tr. 388). It offered 115 machine types while its largest competitor offered only 22, and most offered far fewer (App. A, finding 10, p. 33). There is no evidence of the development of any significant potential competitor (App. A, pp. 35, 37), and United is the only company in the market manufacturing and offering a broad line of shoe machines (App. A, finding 10, p. 33). No independent shoe-machinery repair company has come into being since 1955 (Tr. 577).[7]

II. PROCEEDINGS IN THE COURT BELOW

A. THE PRE-TRIAL ORDER

After the filing of the cross-petitions for modification, the district court on July 19, 1965, entered a pre-trial order specifying that the issues in the hearing

[6] United, according to its own sample, accounts for 100 percent of the injection-molding machines used in this country (Def. Exh. 60A, Tr. 1741). Injection molding is a new process of great commercial significance which substantially developed after the entry of the original decree (Tr. 89–90, 93; Pl. Exh. 29, Tr. 105).

[7] United asserted that a sampling of the number of machines in manufacturers' inventories showed its market position to be between 52 and 57 percent and that there were no artificial barriers to entry into the industry. It also attempted

would be confined to certain matters which the court considered appropriate for updating factual information previously available.[8] No other evidence was to be presented except as the court might specifically order. It expressly declined to consider any question of relief, stating that "[i]t is * * * inappropriate as of this time to offer any suggested program of divestiture, which if considered later in the hearings certainly will require a conclusive showing of failure of the decree, as now operative, to have effected the goals originally contemplated." Discovery and the evidence at the hearing were limited to the scope of the pre-

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to show, by a comparison of the revenue positions of 12 selected companies, that competition had been intensified because its total shoe machinery revenues had declined from $32.3 million in 1955 to $24 million in 1963, while its competitors' revenues had increased from $3.5 million in 1955 to $8.8 million in 1963 (see note 13, *infra*).

[8] The information included a census of machines, broken down into United and non-United machine types in the continental United States as of January 1, 1955, and January 1, 1965; general trends explaining any changes shown in the 10-year period; a comparison of the second-hand market at the beginning and end of the 10-year period; a description of changes in domestic shoe machinery demand and in the number and types of United and non-United equipment available; domestic shipments during 1964 for sale and lease by United, its domestic competitors and its foreign competitors, broken down by machine types; a general statement of net worth as of January 1965, annual net income as of 1963 or 1964, number of employees as of 1965, and machine types offered as of 1965, as to United and its domestic and its foreign competitors; a description of the effect of the decree on installation, construction, repair and other services; and a general description of significant developments during the last decade relating to shoe machinery patents, licensing, and challenges to patent validity or enforcement against infringers.

trial order.[9] Thus, the district court restricted its consideration to whether any modification of the decree was required. Only if the court determined that some additional relief was necessary would it allow evidence relating to what sort of further relief would be appropriate. In light of its decision on the first question (*infra*, pp. 11–12), it never reached the second issue.

B. THE DISTRICT COURT'S DECISION

After an extensive hearing, the district court entered its order denying the petition (App. A, p. 39). Citing *United States* v. *Swift & Co.*, 286 U.S. 106, it stated that its original decree could not be changed unless the government made (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions (App. A, p. 26). It found that Paragraph 18 of the decree contemplated nothing more than the application of this standard, and conferred no "broader power" on the court "to alter its decree" (App. A, p. 27). The statement in Paragraph 18 that the decree should be evaluated in light of its "effect in establishing workable competition," the court said, "was unfortunate because it has no precise legal meaning" (*ibid.*). When read, however, in light of the original opinion, the court stated, "the object of the decree was, during a ten year period, *not to restore* so-called workable competition *but to move toward* establishing it" (App. A, pp. 27–28) (emphasis added). Therefore, "what the court was inviting [in para-

[9] However, the court permitted the government to introduce certain revenue figures as relevant to market shares. (Pl. Exhs. 69, 71, 72, 73; see *supra*, pp. 6–7.)

graph 18] was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the market" (App. A, p. 27). When it entered its original decree, the court said, it "was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed" (App. A, p. 28).

The district court made 16 findings of fact from which it concluded that its decree was working as it had contemplated. It found that United now received 62 percent of total shoe machinery revenues as against 85 percent prior to the decree (App. A, finding 2, pp. 29–30), and that United's overall market position ranged between three-fifths and two-thirds, roughly 25 percent less than the share (85 percent) it enjoyed in 1953 (App. A, finding 5, p. 31). It viewed this shrinkage as satisfactory in light of findings as to the growth of United's competitors, total shipments, machines on lease, the condition of the second-hand market, and the entry of the new narrow-line companies. It found that United had no exclusionary power over minor machines (App. A, finding 13(c), p. 35), and that if the shoe machinery industry were divided into seven sub-markets corresponding to the seven stages of shoemaking (a definition developed by the court after the record closed), it was not clear that United had a dominant position (App. A, finding 15, pp. 35–36). Even if it did, the court found, this was not due to restraints of trade but to United's

large volume, wide contacts, superior products, skill in merchandising, efficiency, inventions, and know-how (App. A, finding 16, p. 36).

On the basis of comparisons of sales and lease revenues between 1953 and 1963, and numbers of machines sold and leased, and the fact that its competitors were growing, the court found that United's position in the market was declining (App. A, pp. 36–37). All artificial barriers to entry had been terminated, it declared, and if competition was not flourishing in some sectors it was because no competitor with large financial resources had entered the market (App. A, p. 37). And this was because, it found, the rate of return on shoe machinery is unattractive as compared with other machinery markets (*ibid*).

Thus, the district court determined that the decree "has operated in the manner and with the effect intended" (App. A, p. 36), and is "still working at its long-range task of freeing the market" from United's monopolization and keeping the door open for "an adequately provided challenger" (App. A, p. 38). "Until there are competitors throughout the market," the court concluded, "the decree should stand unmodified" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

1. *The district court applied an erroneous standard in determining whether the government was entitled to further relief.* The decision below adopts a criterion for further relief under antitrust decrees which departs from established principles and threatens effective antitrust enforcement. This Court has frequently observed that formulating effective relief is

the most important aspect of an antitrust case, for the litigation "has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it." *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 323; see *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88. The standard for relief in cases under Section 2 of the Sherman Act is clear. "[A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577; see also *International Salt Co.* v. *United States*, 332 U.S. 392, 401. This principle seemingly was followed and relied upon by the district court in its 1953 opinion and decree (see 110 F. Supp. at 346–347), a decision which this Court subsequently affirmed (347 U.S. 521).

Indeed, although the 1953 decree was quite moderate in its terms, the government did not challenge its adequacy on appeal. There was no sound reason for it to have done so, however. The district court had expressly recognized that the principal object of its decree—and indeed of any decree in a Section 2 case—was to eliminate United's monopoly and restore competition in the shoe machinery market (110 F. Supp. at 346–347). Moreover, in Paragraph 18, it had made specific provision for re-examination and reconsideration of its decree after ten years' experience. If the decree proved inadequate to break up United's monopoly or render it impotent, the lower court could reasonably be expected,

under this provision, to take the measures necessary for further relief. See *Associated Press* v. *United States,* 326 U.S. 1, 22–23. Thus, in discussing the relief aspects of the case the government—correctly—advised this Court in its brief on the merits of the first appeal that the district court had "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance." Brief for the United States, No. 394, 1953 Term, pp. 154–155.

The district court's ruling here, however, departs from the standards for adequate relief originally applied by it and upheld by this Court. Paragraph 18 of the decree expressly provided for a determination after ten years of the decree's "effect in establishing workable competition." But ten years later the court applied a different standard—not whether the decree had done so, but how successful it had been in *gradually eroding* United's 1953 power to monopolize the market. It thus changed the test for determining the decree's effectiveness from whether the decree had worked to whether it was in the process of working. For the promise of a more drastic remedy if the moderate relief of the original decree proved ineffective, it substituted acquiescence in an indefinite continuation of an industry structure which remains monopolistic (see the discussion *infra,* pp. 18–31). Had the government known in 1953 that Paragraph 18 would be so construed, it might well itself have appealed on the adequacy of relief, and, in such circumstances, it appears doubtful that this Court would have so read-

ily affirmed, at least without discussing the scope of the decree.

The district court's error in the instant proceeding arose from its determination that *United States* v. *Swift & Co.*, 286 U.S. 106, controlled, and its consequent holding that the government was entitled to additional relief to dissipate United's monopoly only if it made "a clear showing of * * * grievous wrong * * * evoked by new and unforeseen conditions" (App. A, p. 27). We submit, however, that *Swift* is inapplicable in any antitrust case in which the government as prevailing party invokes the lower court's continuing jurisdiction to order further relief on the ground that the original decree has not been effective in restoring competition after a reasonable time.

In *Swift* defendants who had consented to a decree designed to eradicate monopolization sought a substantial narrowing of its prohibitions. This Court held that, on defendants' application for modification in such circumstances, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned" (286 U.S. at 119). In contrast, by applying for modification here the government as prevailing party is simply seeking to vindicate the underlying purpose of the antitrust laws—restoration of effective competition to a market in which it has been foreclosed by a violation. The *Swift* opinion recognized this, for the Court carefully distinguished between injunctions that protect rights accrued upon permanent facts, "and

those that involve the supervision of changing conduct or conditions and are thus provisional and tentative" (*id.* at 114), and went on to note that whether a decree may be changed depends upon the interest it is intended to protect (*id.* at 117–118).

Since an antitrust decree is intended to protect the public interest, the proper test for determining whether further relief is appropriate is not whether some unforeseeable turn of events has clearly rendered the original decree wholly ineffective, but whether modification is necessary because the original decree has not cured the violation. This distinction between the government's right to modification and that of an antitrust defendant is no more than an application of the familiar principle that "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 552.[10]

If the stringent *Swift* standard for antitrust defendants seeking modification of consent decrees is applied to the government, a district court may, in the absence of an extraordinary change of circumstances, simply adhere to its original relief instead of considering whether the decree has in fact restored competition after a reasonable time (see *supra,* pp. 14–15). This would almost invariably, as a practical matter, reduce the most crucial aspect of antitrust litigation—relief—to one-shot guesswork. Even though the court's first attempt at relief proved unsuccessful, or

[10] See also Note, 80 Harv. L. Rev. 1303, 1311–1314.

less than completely successful, the public would be forced to suffer the anti-competitive consequences, thus substantially frustrating the purpose of the original suit, and significantly impairing effective enforcement of the antitrust laws.

The district courts have a special responsibility for avoiding such pitfalls by providing effective relief (*United States* v. *E. I. duPont de Nemours & Co.*, at 322–323), and this necessarily includes the obligation to modify their decrees to ensure accomplishment of this purpose. *Chrysler Corp.* v. *United States,* 316 U.S. 556, 562; but cf. *Ford Motor Co.* v. *United States,* 335 U.S. 303, 322. A provision such as Paragraph 18 is incorporated in decrees to define when and how that obligation will be exercised.[11]

It embodies an extremely important element of antitrust relief, for it serves to prescribe the timing and manner in which the validity of the court's predictions, as reflected in the original decree, will be tested against observed economic developments. Such a provision reduces the necessity for appeals by the government directed at the adequacy of relief. *Associated Press* v. *United States, supra.* It further per-

[11] Here the lower court not only retained jurisdiction generally (see Par. 23 of the decree, App. B, p. 49), but specifically included another paragraph in its decree—Paragraph 18—explicitly providing for a re-examination thereof after a fixed period of time. As developed earlier (*supra*, pp. 15–17), we regard the *Swift* standard as inapplicable where the government seeks modification of a litigated antitrust decree. This is particularly so, in our view, in the situation like the instant one, where the decree includes a provision such as Paragraph 18, in addition to a general retention of jurisdiction to modify in the future.

mits an extremely desirable degree of flexibility on the part of antitrust enforcement officials, as to the nature and scope of relief sought initially, particularly in those cases where relief questions pose considerable difficulty. The decision below, however, seriously undermines these purposes and departs from established criteria for effective relief in antitrust cases. As a result of this error, a company whose monopoly power was supposed to have been eliminated by a decree entered more than a decade ago continues its domination of the affected industry.

2. *The decree has not broken up or rendered impotent United's monopoly.* It is clear on this record that, viewing the shoe machinery industry as a whole, United continues to enjoy a monopoly or near-monopoly position and that "workable competition" has not been established.[12] The district court found that United presently controls between three-fifths and two-thirds of the market and receives 62.2 percent of the total industry revenues. None of its competitors compares with it in range of machine types offered, assets, production or research facilities, or sales.

While United's principal source of revenues is from leased machines ($22.3 million, or 54 percent

[12] "'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements * * *'." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 176, quoting from Report of the Attorney General's National Committee to Study the Antitrust Laws, 320 (1955).

of total industry revenues), only a few of its competitors can afford to lease on a substantial scale. Only two of its manufacturing competitors (and one second-hand dealer) had more than $1 million in shoe machinery revenues in 1963; the remaining companies were relatively small and most were miniscule in size. None is capable of offering the broad line of machine types leased and sold by United, and most offer only a handful compared to United's 115 basic machines. No broad-line company with substantial resources has entered the field, and there is no evidence of any substantial potential entrant who might influence competitive behavior in the market (cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. at 176; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651). United's present dominance of the industry, combined with the market advantages which its past dominance gave it, constitute a significant barrier to new entry. Cf. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 586 (concurring opinion of Justice Harlan). Indeed, the court below acknowledged that in several sectors of the shoe machinery market United is without significant competition.[13]

[13] The court made a number of findings which appear inconsistent with this analysis. We believe these are clearly erroneous.

It found that large machine manufacturers were hesitant to enter the shoe machinery industry because the rate of return was unattractive as compared with other machinery markets (App. A, p. 37). But there was no evidence before the court regarding rates of return in other industries. It was excluded by the court's pretrial order.

In finding that United's shoe machinery revenues had declined from $32 million in 1955 to $24 million in 1963, the court excluded from its computation United's income from conver-

Thus, after ten years which were marked by dynamic growth in the economy as a whole, a static monopolistic structure persists in the shoe machinery industry. This clearly indicates that the moderate measures of the original decree have not worked. Nor does the record indicate that a further "erosion" of United's monopoly position can be expected by reason of competitive forces presently existing in the market. If the market is not competitive now, it is unlikely to become so in the absence of substantial increments of new demand or remarkable new innovations. Moreover, since many key provisions of the

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sion sales which ballooned in 1955, the first year of the decree's operation (App. A, p. 31). If it had compared revenues in 1954 (the year before the decree) and 1963, and had included revenues from parts and service, United's aggregate shoe machinery earnings would have been $35.6 million in 1954 and $35.4 million in 1963 (Pl. Exh. 68, *supra*).

The court's finding that United's "12 most important domestic competitors" doubled their gross revenues between 1955 and 1963 (App. A, p. 31) is based upon a chart at page 15 of United's closing brief, which did not show the 12 largest shoe machinery manufacturers in 1955, and which showed on its face that in 1955 several of the 12 companies either were not in the shoe machinery business or had revenues which were unknown.

The court's finding regarding conversion sales (App. A, pp. 32–33), *i.e.*, sales of used machinery to the lessee, glosses over evidence that the number of such sales has been continuously declining since the decree, thus threatening to dry up the second-hand market which the court cites as an important competitive factor. (Pl. Exhs. 68, 74, *supra*).

The court found that United's continued dominance was not due to restraints of trade and that United had fully complied with the decree (App. A, pp. 29, 36). But there is no evidence supporting this in the record, since it was excluded by the pretrial order.

present decree are declining in significance,[14] there is no basis for the court's renewed prediction that United's monopoly position will continue to decline.[15]

3. *The case should be remanded for further relief.* The failure of the moderate provisions of the original decree to restore effective competition in the shoe machinery industry after a full decade indicates that more effective measures are necessary. The public is entitled to the restoration of competition as rapidly as possible. Since mere changes in United's restrictive practices, under the original decree, have not done the job, the district court should have considered direct measures which will deprive United of the benefits of its past illegal conduct and break up its monopoly position. In view of the history of this case and the present state of the industry, we believe, at least *prima facie,* a case has been made for divestiture of a portion of United's shoe machinery assets. Market power is often closely related to dominance in productive capacity and one of the most effective means of striking at that power is to convert part of the capacity into a new source of competition.

In its original decision the district court rejected a proposal that United be dissolved into three manufacturing concerns because it considered such a pro-

[14] *E.g.*, most of the patents United was required to license have expired, while its new patents, as to which there is no compulsory licensing, cover important new devices, such as injection-molding machines (see note 19, *infra*).

[15] Despite United's continued dominance of the market, it should be noted that the district court did not provide for another re-examination of its decree in the light of additional experience. In this respect, the court's prediction is quite open-ended.

posal to be impractical (110 F. Supp. at 348–349). But practicality is relative to what lesser measures can accomplish and have in fact accomplished, and must be accommodated to the need for effective relief. Now that provisions short of divestiture have proved unsuccessful, it is appropriate—indeed, in our view, essential—to reconsider the question.

In the instant proceeding, the government petitioned the district court to require United to submit a plan "pursuant to which the defendants shall establish an independent, full line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market." Such a company might be created from one of United's present divisions,[16] with the requirement that United transfer to the new company sufficient productive assets, patents, technological know-how and personnel to enable it to begin successful operations.[17] If there

[16] United has a division (B. B. Chemical) and shoe cement and eyelet operations from which a going concern could be created which would have assets and sales greater than any of United's current competitors and which is already staffed with United personnel. Such a company would serve the apparel, textile, construction and packaging industries, as well as the footwear industry, and would thus have the advantage of serving a non-shoe machinery market which could support its efforts to expand its shoe machinery line. United could be required to give the new company assistance, in the form of equipment, funds, patents and technology, including the loan of personnel. Professor Carl Kaysen, who served as Judge Wyzanski's "law clerk" during the proceedings which led to the 1953 opinion and decree, makes this suggestion. Kaysen, United States v. United Shoe Mach. Co., 289–294 (1956).

[17] This would avoid such problems as lack of know-how, lack of access to shoe factories, and creation of unnecessary productive capacity.

are substantial economic reasons why such a plan is not feasible, given the present state of the industry, the burden should be on United—not the government—to establish this at a hearing.[18] Other possibilities for forms of partial divestiture exist, and, for instance, might include the acquisition of some of United's shoe machinery assets by an existing company.

If partial divestiture of United's domestic assets should prove impractical, other methods of achieving the same result should be considered. For example, United's British Commonwealth group is centered around British United Shoe Machinery Corporation. It is probably the largest shoe machinery company in the world after domestic United, although it presently exports little if any machinery into the United States. Since there are no customs duties on the importation of shoe machinery, the British company could be an important actual or potential competitor if separated from United, and its entry could be expected to motivate companies in the market to more efficient performance, particularly in respect to the development of new machines.[19]

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[18] As noted earlier (*supra*, p. 10), because of the district court's determination to bifurcate the proceedings below, no evidence was introduced on the question of what sort of further relief would be appropriate. The government does not view its suggestion that United be required to establish a competing company as the only suitable form of further relief. Rather, that suggestion was one made at the initiation of the instant proceeding and simply represents one form which the basic additional relief which the government thinks necessary and proper—partial divestiture—might take.

[19] The district court might also consider additional patent relief, such as making available to the industry on a reasonable

Other possibilities may be developed once the district court undertakes to explore the question of further relief. But until a hearing is held on that question, the prospects for additional and more effective remedies cannot be adequately evaluated. Exploration and development of a record on relief issues were wholly foreclosed by the district court's pre-trial order and by its erroneous determination that modification of the decree was unwarranted. That decision—that no further relief is warranted—should be reversed, and the case should be remanded to the district court for a further hearing on the question of additional relief, and, ultimately, for appropriate modification of the original decree.

CONCLUSION

This appeal presents substantial issues affecting the adequacy of antitrust relief under Section 2 of the Sherman Act. Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1967.

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royalty basis patents acquired by United since the date of the original decree (see note 14, *supra*). This might be accompanied by a requirement that technical know-how, blueprints, and the like be made available with the patent licenses.

APPENDIX A

United States District Court

District of Massachusetts

Civil Action No. 7198

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

OPINION

April 11, 1967

WYZANSKI, *Chief Judge:* The Government and United Shoe Machinery Corporation have each filed a petition for modification of this Court's decree of February 18, 1953, affirmed by the Supreme Court of the United States May 17, 1954, and subsequently modified July 12 and September 17, 1954. See *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), aff'd. *United Shoe Machinery Corp.* v. *United States*, 347 U.S. 521.

The Government's petition seeks to have United dissolved into two companies. United seeks to have the restrictions now imposed limited to requirements of sale of any machine types offered for lease, maintenance of a reasonable commercial relationship between sale terms and lease terms, separate charges for service, and avoidance of restrictive clauses such

as the full capacity clause. Both petitions rely upon the following language in paragraph 18 of the decree:

> "On C Day [December 23, 1964] both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market."

Threshold questions are what is the scope of this Court's power in these proceedings, what standards are to be applied in the exercise of this power, and what issues are before this Court. With respect to the first two questions an authoritative answer is given by *United States* v. *Swift & Co.*, 286 U.S. 106. A court can modify a continuing injunction not on the basis of conditions that existed at its making, but only on the basis of new and unforeseen conditions. Moreover, the court should require a clear showing of grievous wrong. In *Swift,* where the Supreme Court denied a defendant's application to have a decree modified, it enunciated the criteria in the following words (286 U.S. at p. 119) applicable *mutatis mutandis* to a plaintiff's application:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery

> business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

Swift has been followed consistently. *Morse-Starrett Products Co.* v. *Steccone,* 205 F. 2d 244 (9th Cir.); *Bigelow* v. *Twentieth Century-Fox Film Corp.,* 183 F. 2d 60 (7th Cir.); *United States* v. *Lucky Lager Brewing Co. of San Francisco,* 209 F. Supp. 665 (D. Utah).

Nothing in paragraph 18 of the decree departs from *Swift's* teaching or purports to confer upon this Court a broader power to alter its decree, or authority to apply different standards. The requirements remain (1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions. Indeed if paragraph 18 gave this Court the power to alter a decree on any lesser showing the decree would not have been final and appealable to the Supreme Court.

What paragraph 18 does is to direct the parties to an issue: the decree's "effect in establishing workable competition." The phrase was unfortunate because it has no precise legal meaning. But if paragraph 18 be read against the accompanying opinion, *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, it is apparent that what the Court was inviting was information as to how successful the decree had been in gradually eroding United's 1953 power to monopolize the market. The opinion makes it plain that the ob-

ject of the decree was during a ten year period not to restore so-called workable competition but to move toward establishing it.

The issue now raised requires that this Court first state what it knew at the time of the decree and what it then chose.

The following were among the facts of which this Court was aware in 1953. United had by far the largest financial and patent resources in the shoe machinery industry. It was the only company that offered a wide line of machine types. If United were allowed to continue leasing, even on a basis that gave shoe factories an alternative to purchase the leased machine at an equivalent price, almost all shoe factories would prefer to lease their new and more complicated machines. That preference would enable United to continue its visits to most shoe factories. It would permit United to place machines on lease on an experimental basis. It would make it difficult for any competitor to succeed in connection with the marketing of complicated expensive types of machinery for which there was a thin market unless the competitor had resources adequate to offer a long line of machine types, to accept compensation in the deferred form of rental payments, to make its lease terms the commercial equivalent of its sale terms, and to withstand the at least temporary inconvenience of having leased machines returned after a short rental period. In short, this Court was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed.

Yet this Court chose not to dissolve United, and

not to prohibit leasing, but merely to purge the leases of certain specific restrictive clauses, to require United to offer lessees the alternative of purchasing, and to require United to take certain miscellaneous steps which need not now be recited. Among the reasons that this Court made this choice were that the Supreme Court had approved the constitution of United as a single enterprise, that it had permitted United to proceed with leasing as an exclusive method of distributing machines, that United had engaged in no predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to other results of United's skill, ability, and efficiency.

Both parties have submitted requests for findings. They have been helpful in directing this Court's attention to what the decree has accomplished, to what are the dynamics of the 1963–1964 [hereafter sometimes called "the present"] shoe machinery market, to the freedom of choice now enjoyed by the shoe factory users of shoe machinery, and to the freedom of competitors in the present market structure. But those topics need not be covered by this Court in detail and hence, so far as not granted herein, all requests for findings are denied.

Paragraph 18 of the decree by referring to affidavits indicated that this would be a summary proceeding. It is important not to plague anti-trust law by establishing a precedent which might lead to full scale second trials of anti-trust cases on every claim that, as shown by its effects, an outstanding decree was too lenient or too severe. The only findings which this Court deems appropriate and necessary follow in numbered paragraphs.

1. United complied fully with this Court's decree.
2. Before the 1953 decree United's share of the

shoe machinery market by any measure was about 85 per cent. While in 1953 there was no specific finding with respect to United's then share of the revenue from shoe machinery sold and leased, it is a fair inference that, because of its strong position in the distribution of major machines yielding the largest revenue, United's share of the total revenue exceeded 85 per cent. In 1963 it had declined to about 62 per cent of the current shoe machinery market.

3. That market now includes machines for the manufacture of vulcanized rubber because such machines are competitive with injection moulding machines and other shoe machinery, are used in conventional shoe factories, and are used for both leather-upper and fabric-upper footwear.

4. The aforesaid revenue percentage of the shoe machinery market is a far more satisfactory index of share of the market than any other suggested. That index is far more illuminating than one based on a mere count of machines in position in shoe factories without distinguishing the machines by type, or value, or yield. It is also more satisfactory than one based on the value of annual shipments, an index which disregards the payment of rentals upon or conversion prices for machines shipped in previous years. It is a better index than one computed by the use of tables with 30 classifications according to the major and minor shoe machinery processes of the pre-1953 decree period, and referred to in the 1953 opinion, 110 F. Supp. at pages 304–305, 306. Those classifications do not reflect the extent to which technological changes require that there be grouped in two over-all classifications the machines used in competitive processes for (a) lasting and (b) sole attaching. Moreover, insofar as a tabular presentation is applied to machines in position in shoe factories in 1963 it fails

to recognize that, unlike the situation in 1953, machines of United origin, not necessarily being on lease, are not necessarily sources of current payments by shoe factories and are not part of the current market.

5. There are many indicia confirming the correctness of the conclusion derived from the revenue index that United has about three-fifths to two-thirds of the shoe machinery market now, that is, a shrinkage of more than a quarter of the share of the market it had in 1953. (a) Although during the last decade the number of shoes produced annually rose, and therefore it may be inferred that the value of shoe machinery in the shoe factories rose, and although the value of the dollar declined, nonetheless United's total annual revenues from shoe machines sold and leased, from the sale of parts, and from repair services in 1955 was certainly less than before the decree. Indeed the combined lease and sale figures for United shrank from $32 million in 1955 to $24 million in 1963. During the same 1955–1963 period United's 12 most important domestic competitors doubled their gross revenues. (b) United's decline in annual earnings before taxes of the Shoe Industry Group, after elimination of proceeds from conversion sales, had dropped from over $11 million at the time the decree became effective to less than $6 million at February 29, 1964. (c) United's employment declined approximately 30 per cent in its Beverly plant and 40% in its service branch. (d) Of the machines shipped in 1963 in the 30 classifications shown in the tables used in 1953, United supplied 51.7 per cent, which is a figure combining 65 per cent of so-called major machines and 42.3 per cent of minor machines. (e) Of the machines now in shoe factories about 54 per cent were of United origin, but

only 47 per cent were being leased from or had been bought from United.

6. Since the decree the number of United shoe machines on lease in domestic shoe factories fell from 91 to 26 thousand. Of the machines in domestic shoe factories only 17 per cent in 1963 were on lease from United. While approximately 90 per cent of the machines shipped by United in the post-decree decade have been on lease, a substantial number of them are ultimately bought by shoe factories. The reasons that most shoe factories initially lease rather than buy machines of the expensive types are not because the lease terms are not commercially related to sale terms, but because shoe-makers prefer to have the right easily to dispose of expensive machines and because they lack either the financial ability or the inclination to invest substantial capital in shoe machinery. The continuation of the pattern of leasing expensive machines is a response to the demand from the shoe-making market which has 785 enterprises, many of them of modest resources. Without leases many of them could not continue in business.

7. The decree has tended to open the market by promoting the return of United machines by customers. For example, the total returns to United by customers of so-called major machines exceeded the total shipments by more than one-third during 1955–1964. This trend promotes competition by making the shoe factory a more frequent customer for shoe machinery.

8. In the decade 1953–1963 shoe factories purchased over 53,000 machines which they had previously leased from United. Most of the conversions occurred soon after the decree. But in the tenth year over 1300 machines were converted, and in 1964 the number was 678, which was more than one quarter of the

machines United leased that year. Each purchase reduces United's power by making it likely that the machine will ultimately enter the second-hand market.

9. United has faced important competition from an active second-hand market, largely of its own machines. In 1963 that market sold about $3 million in machines, which stands comparison with United's revenues of $22 million from leases and $1.6 million from sales. The second-hand market is sufficiently vigorous so that it is not unusual now for shoe factories to start in business utilizing many machines originally of United manufacture, without obtaining a single machine from United.

10. At the end of 1955–1964 period there were about 126 suppliers of new shoe machines. The pace of entry into the market in each three-year period after the decree increased: from 11 to 19 to 26, or a total of 56 companies. None of these, however, is a company offering a wide line. Indeed while United offered 115 types of machines on current terms and 24 types on application, Compo Shoe Machinery Corporation offered only 22, International Shoe Machine Corporation only 5, and most companies only 1. The small companies have shown that in many sectors of the industry a machine manufacturer can be effective in one or several parts of the industry without the need of participating in other parts.

11. The unanimous and representative testimony of shoe makers is that there now exists in the shoe machinery market sufficient competition to allow the shoe manufacturers to select machinery as they wish on the merits of the machines available and in accordance with the processes they select to meet the various style changes in the consumers' market. In particular, United is subject to constant full and free competition from competitors' machines in toe last-

ing, side lasting, sole attaching, pulling over, and bottoming. That kind of competition reveals that several of the 18 sub-classifications of "major machines" are in competition with one another and that percentage calculations based upon each separate classification are misleading unless machines which are in competition with one another are grouped together, thus reflecting the true character of the shoe machinery market.

12. In 1953 United had and exercised power to exclude competitors from every significant classification of shoe machinery except cement sole attaching machines.

13. However, by 1963 United was not in fact exercising, and indeed was incapable of exercising, exclusionary power over the entire market. This is shown not merely by its reduced share of the market, by its altered leases, and by the growth of competition from domestic manufacturers, importers, and second-hand machinery but by the following miscellaneous indicia.

(a) With respect to the lasting and sole attaching sectors of the market cement processing, injection molding, and direct-mold vulcanizing had become competitive with the seven older techniques,—McKay, Nail, Turn, Goodyear Welt, Stitchdown, Prewelt, and Lockstitch. Those older techniques, where United offered over 90 per cent of the machine types, declined from 55 per cent of the relevant sub-market in 1950, to 42 per cent in 1955, to 33⅓ per cent in 1963. In the newer techniques, United does not hold a commanding position. The result has been that United cannot control competition in the lasting sector as a whole or in the sole attaching sector as a whole.

(b) Of the shoe machines in position in shoe factories only 51 per cent had been shipped by United

and only 17 per cent were covered by United leases. That finding, as already noted, does not show United's share of the entire market. But, inasmuch as from other evidence it appears that United's share of so-called major machines is far higher than its share of minor machines, it follows that in minor machines as a whole, and probably in most categories of minor machines, United has no exclusionary power.

(c) Of the shoe machines shipped in 1963, United's share by value may be as little as 48 per cent, and certainly is not much over 50 per cent. Here again, that finding, as already noted, does not show United's share of the entire market, because it eliminates current revenues from machines shipped in earlier years. But, in view of other evidence indicating that United's share of so-called major machines is far higher than its share of minor machines, it follows that in minor machines as a whole, and probably in most categories of minor machines, United has no exclusionary power.

14. In 1963 there were certain sectors of the shoe machinery market in which United was without significant competition, but it does not follow that United's position in those sectors was a result of United's exclusionary power or made competition unworkable. Indeed, it is more reasonable to conclude that the want of competition was due to the absence of a challenger of adequate, but not unusual, financial resources, skill, ability, and efficiency.

15. In almost every one of the 45 of the 187 operations in domestic shoe factories where United was the sole source of supply fewer than 6 machines a year are demanded and the operation, looked at alone, is not economically attractive. What is far more important, the operation is shown to be competitive with other operations for which other sources than

United supply machines. On this record, it is inferrable that, for the purpose of the anti-trust acts, the machines used in the 187 operations ought to be combined to constitute perhaps as few as 7 markets, one for each stage of shoemaking. It is not clear whether after that was done United would have a dominant position in some of the sub-markets thus constituted.

16. If United does have a dominance in some of those sub-markets such dominance is not due to "restraints of trade" in the technical sense. There is a variety of causative factors such as United's financial capacity to offer lease terms commercially equivalent to sales terms on the same machine types, United's broad line of machine products manufactured in one plant (which permits United with economic advantage to supply machine types for which there is a small annual market and which also permits United to set for different types of machines terms which reflect different rates of profitability), United's constant contacts with most shoe manufacturers as a result of the large volume of machines United ships annually and the large number of leases it has outstanding, and United's excellent products, superior skill in merchandising, efficiency in administration, inventions and know-how. Every one of those factors was known to this Court when it entered its decree in 1953. New information with respect to the operation of those factors since 1953 shows that they have not individually or collectively had an unforeseen effect or worked a grievous wrong.

From the foregoing findings of fact this Court concludes that the 1953 decree has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded

United's power and already dissipated much of the effect of United's monopolization.

In some sectors of the market, competition is already flourishing. In the sectors where it is not flourishing, all artificial barriers have disappeared and the position enjoyed by United is chiefly traceable to the fact that it has not yet been challenged by a competitor of financial resources of any magnitude. United follows no practice and enjoys no significant advantage which could preclude or restrain competition by an enterprise of a size comparable with leading machinery companies in other industries, that is, with resources adequate to offer lease terms commercially equivalent to sale terms and to offer simultaneously machine types in several categories where the annual demand is too thin to be economically supplied separately. The apparent reason why no such competitor has appeared is that compared with rates of return in other machinery markets, the rate of return in the shoe machinery market is unattractive.

It cannot rightly be said that a market or a sector thereof is, in the legal sense, not open to competition where an effective challenge may be made by an enterprise of resources common in comparable fields.

While this Court now has before it the facts of the decade 1954–1963 which were not known in 1953, nothing new, aside from the updating of the data, is involved. United has not created new barriers. In 1953 the resources of United in absolute terms were substantially the same as, and in comparative terms substantially less than, they are now.

It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large

competitor appeared. But the choice was made in 1953 for reasons already adequately explained.

What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953. On the authority of the *United States* v. *Swift & Co.*, 286 U.S. 106, 119, the Government's petition is denied.

United's petition stands no better. United wants to adjust the decree on the ground that the purposes of the decree have been accomplished and milder restraints are now in order. But the premise is unsound. The decree is still working at its long-range task of freeing the market from all consequences of United's monopolization and keeping the door wide open for the arrival of an adequately provided challenger. Until there are competitors throughout the market, the decree should stand unmodified. United's petition is also denied.

Before concluding, this Court expresses its appreciation of the brief filed by *amici curiae*, the National Footwear Manufacturers Association and the New England Footwear Association. Their analysis of this case has greatly influenced this opinion. Their assurance that their clients, who represent substantially all the shoe manufacturers, who are among the chief intended beneficiaries of this Court's decree and who have had an unequalled opportunity daily to observe its effects in the last decade, are content with its operation and do not want it modified, gives added ground for leaving the decree undisturbed.

Petitions denied.

CHARLES E. WYZANSKI, JR.,
Chief Judge.

United States District Court

District of Massachusetts

Civil Action No. 7198

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

ORDER

April 11, 1967

WYZANSKI, *Chief Judge:* In accordance with the opinion filed this day, the petition of United Shoe Machinery Corporation and the petition of the United States, each seeking modification of the decree herein, are severally denied.

CHARLES E. WYZANSKI, Jr.,
Chief Judge.

APPENDIX B

UNITED STATES *v.* UNITED SHOE MACHINERY CORPORATION

DECREE OF THE COURT

As Modified—July 12, 1954.

Amendments have been made only in Paragraphs 1, 6, 6(h), 6(i), 6(j), 7, 12, 13, 14, and 20.

This cause having come on to be heard, and the Court having fully considered the evidence and arguments, and having filed its Findings of Fact, and Opinions on Violation and Remedy, it is hereby

Ordered, Adjudged, and Decreed that:

1. As used in this Decree:

"A Day" means January 1, 1955.

"B Day" means April 1, 1955.

"C Day" means January 1, 1965.

"Shoe Machinery" means all types of shoe machinery distributed to shoe factories for use in the manufacture or repair of footwear, except dry thread sewing machines.

The words "machine type," "machines" and "machine" as used in this Decree mean "shoe machinery" as defined herein.

The word "supplies" as used in this Decree means all products, when distributed by defendant for use or consumption by shoe factories, of the types heretofore classified by the defendant as sales merchandise.

The word "patent" as used in this Decree means a United States patent for an invention

relating to the manufacture, use or sale of footwear, shoe machinery or supplies.

2. Defendant violated Sec. 2 of the Sherman Act, 15 U.S.C. Sec. 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, and eyelets, which is concerned with supplying the demand for those products by shoe factories within the United States. The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice. No obligation of the defendant under this decree shall apply to its manufacturing, distribution, service, patent or other activities in any industry other than shoe machinery and supplies or in relation to any industry other than the shoe manufacturing industry.

3. Defendant, its subsidiaries, and each of their directors, officers, agents, and employees, and, all persons acting for them are hereby enjoined and restrained from further monopolizing those parts of the trade or commerce among the several States which have been referred to in the previous paragraphs.

4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market.

5. After A Day, defendant shall not offer for lease any machine type, unless it also offers such type for sale. Defendant, if it offers any machine type for lease, shall set such terms for leasing that machine as do not make it substantially more advantageous for a

shoe factory to lease rather than to buy a machine. Defendant shall not be required to secure advance judicial approval of the financial terms in sales or lease contracts. But if any lease or contract substantially discriminates in favor of leasing, plaintiff may apply to this Court for further specific relief.

6. Before A Day, defendant, if it desires to continue to lease any shoe machinery, shall file in this Court a standard form of lease that meets the following directions. Other standard forms of lease shall be filed in this Court by defendant promptly as they are printed and before defendant places them in use.

a. The maximum term for either an original or renewal lease shall be five years.

b. Provision shall be made that a lessee shall have the right to return the leased machine at any time after one year, on paying all rentals already accrued, the shipping charges, the cost of broken and missing parts, and in addition, no more than the equivalent of the monthly (not the unit) payments which would have been due had the lessee kept the machine for an additional three months. The lease may provide for return on terms more favorable to the lessee if the return is due exclusively to defects in the machine, or customer dissatisfaction after a trial period, or customer abandonment of operations. But no return charge shall discriminate on account of the substitution of a competitive machine.

c. The new forms of lease shall not include any return or deferred payment charges other than those specified in the previous paragraph. But they may include provisions for initial charges and deposits.

d. Defendant may, if it sees fit, use a unit charge in addition to, or as an alternative to, monthly rental charges. But such unit charges shall have no minimum.

e. After A Day, defendant shall not include within

any lease, whether unit charges are used or not, a full capacity clause, or any equivalent.

f. After A Day, defendant shall not include either in the terms of, or the application of, any lease any plan similar to the right of deduction fund which it has heretofore established, or the 1935 Plan which it adopted for lessees desiring to return machinery.

g. Defendant shall not be obliged to present to the Court a statement of what will be the amount of, or method of calculating, its rentals, its charges, deposits, or like financial terms. But, after A Day, in preparing, executing, or applying its leases, defendants shall not discriminate between customers of the same general class, except that defendant may make different deposit provisions for different persons, upon an individual basis.

h. Defendant may propose various uniform lease riders to provide for peak-load or trial installations. Defendant may also use various loan forms to cover installation of experimental or other machines for which commercial terms have not been adopted. All such riders and forms shall comply with the preceding paragraphs.

i. Each lease shall expressly state what services and privileges it covers. After A Day, defendant may render, without separate charges, instruction services, installation services, repair services, or other services, during a period of 30 days, exclusive of Saturdays, Sundays and holidays, after the machine has been first installed and set up in line for use in shoe manufacture. After such 30-day period defendant shall not provide any such services for a machine covered by a lease, except during the first 60 days, exclusive of Saturdays, Sundays and holidays, of a trial installation period covered by a lease trial rider as above provided, other than upon the basis of separate and

reasonable charges for the services rendered, and the permission to render service for machines covered by lease trial riders herein contained shall be subject to the condition that similar service is made available for trial installations of machines whether to be leased or to be sold.

j. Defendant shall not vary the substance of the forms of lease submitted to the Court, without the Court's approval, but defendant may, without submitting them to the Court, use such special forms of lease or loan agreements as may be appropriate to the requirements of Federal, State or local governmental agencies and of educational institutions not engaged in the manufacture of footwear for profit. This provision shall not be interpreted as requiring defendant to secure advance judicial approval of the dollars and cents figures used in setting monthly rental charges, unit charges, deposits, or other specifically fiscal aspects of the lease.

7. Except for good cause, defendant shall not after A Day refuse a prospective customer's request to lease or buy a machine, of a type which defendant is at the time of such request offering for commercial lease or sale. In the event that a prospective customer is refused the privilege of buying or leasing a machine, he shall have the right to intervene in this case in this Court to have his controversy adjudicated, and in such proceedings, defendant shall have the burden of proving that there is good cause for refusing to make the sale or lease.

8. Before A Day, defendant shall present to the Court, if it desires to continue to render repair and other services, a tariff of the charges which it proposes to apply for rendering service. This service tariff shall have uniform charges for leased and sold machines. It may take into account travel time as

well as time used in making repairs or rendering other services. It may recognize any economy defendant actually realizes in its business on a quantity basis, or any other economies in servicing customers of a particular type, or customers who commit themselves for particular periods of time, in any event, however, not exceeding twelve months at a time. Neither the tariff nor this Decree shall be interpreted as requiring defendant to render services in connection with machines, or parts, not of its manufacture. The tariff shall provide that parts shall be made available on the same terms to customers receiving services, customers not receiving services, and any other person; provided, however, that defendant shall not be obliged to furnish parts to a customer to help him construct an entire new machine out of assembled parts.

9. Before B Day, defendant, after conferring with plaintiff, with representatives of The National Shoe Manufacturers Association, and with any lessees who previous to B Day have intervened in these proceedings, shall present to the Court a detailed plan for terminating all outstanding leases. This plan shall make appropriate non-discriminatory financial provisions for defendant's rights and each lessee's rights in connection with the termination of existing leases. It shall also make make non-discriminatory provisions under which, within a reasonable period of time, lessees under leases existing before B Day may buy or lease those machines which have been installed. Such provisions shall be at least as favorable to shoe factories as the provisions in the new lease and sale forms.

10. Before B Day, defendant shall submit a plan for disposing of such parts of its business and the business of its subsidiaries as are concerned with the

manufacture or distribution of tacks, nails, and eyelets.

11. Beginning three years after A Day, defendant shall not distribute any supplies not manufactured by itself or a corporation in which it owns at least 20% of the Common Stock, provided that this shall not apply to supplies acquired by United before then.

12. Defendant shall grant to any applicant, except a deliberate infringer, a non-exclusive license under any or all patents now held by defendant on reasonable non-discriminatory royalty terms. Such licenses may, however, be limited to the manufacture, use, and sale of shoe machinery, shoe supplies, and like products used in shoe factories. Such licenses may contain a provision for the inspection of the records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. Such licenses shall contain a provision for imparting in writing, at a reasonable charge by the licensor to the licensee, the methods and processes used by defendant as of the date of this Decree in its commercial practices under the patents licensed. This Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Nothing in this paragraph applies to patents issued upon the basis of applications filed later than A Day, nor shall anything herein prohibit defendant from making a bona fide sale or assignment from time to time of any patent held by it.

13. After A Day, defendant shall not acquire any patent or patent application except patents or patent applications acquired by reason of bona fide employment of the inventor by it or by a subsidiary unless defendant files in this Court an agreement to license that patent or patent application as provided in the

previous paragraph with respect to patents it now owns.

14. After A Day, defendant shall not acquire any exclusive license under any patent or patent application unless such exclusive license grants defendant the right to license others and defendant promptly files in this Court an agreement to license as provided in Paragraph 12 of this Decree.

15. After A Day, defendant shall not acquire any shoe machinery business, any business manufacturing or distributing supplies for shoe factories, or any part thereof, or any stock therein, if the transaction involves more than $10,000 or its equivalent.

16. After A Day, defendant shall not buy or acquire any second hand shoe machinery manufactured by it or any other person except for experimental or like purposes. The total acquisitions under this paragraph in any one year shall not represent an expenditure of more than $25,000, or its equivalent. Nothing in this paragraph shall be construed to apply to such rights as defendant may have to repossess, or to acquire at public auction, machines which it has conditionally sold and which the purchaser has lost the right to retain.

17. After A Day, defendant shall not continue any plan for quantity discounts in connection with any of its supplies, unless such discount system complies with all applicable laws.

18. On C Day, both parties shall report to this Court the effect of this Decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.

19. Defendant shall pay the costs of this case.

20. On or before October 1, 1954, defendant shall send to each of its then lessees a written copy of this Decree as modified prior to the date of mailing.

21. Nothing in this Decree shall impose any obligation on defendant until three months before A Day.

22. Nothing in this Decree shall impose any obligation on defendant or its subsidiaries to do or omit any action outside the United States.

23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

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